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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/511,780	02/23/2000	Johannes Baensch	8265-305	3549

28765 7590 03/28/2003

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EXAMINER

MADSEN, ROBERT A

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 03/28/2003

21

Please find below and/or attached an Office communication concerning this application or proceeding.

9

# Office Action Summary

Application No.

09/511,780

Applicant(s)

BAENSCH ET AL.

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 26 December 2002.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 26-36 and 38-46 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 26-36 and 38-46 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

### DETAILED ACTION

The amendment filed December 26, 2002 has been entered. Claims 26-36,38-46 remain pending in the application.

### ***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

2. Claims 38-46 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claim 38 includes the limitation that the cream composition *must be refrigerated to provide a shelf life of at least 45 days*. The disclosure states: (1), "the present invention makes it possible to produce a cream that retains a creamy texture and a fresh taste even after 45 days at refrigerator temperature" (Page 3 lines 29-31); (2) "...this food composition can be stored for at least 45 days at typical refrigerator temperatures" (Page 7, lines 5-11); and (3) "It can be stored at refrigerator temperatures for 8 weeks" (Example 1). The disclosure does not require refrigeration for a shelf life of at least 45 days, but states the composition "can be stored" at refrigerator temperatures and the texture and taste are retained "even after 45 days " at refrigerator temperatures.

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

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The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 38-46 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 38 includes the limitation that the cream composition *must be refrigerated to provide a shelf life of at least 45 days*. This statement is indefinite since it is unclear if the product must be refrigerated in a preparation step to provide a shelf life of 45 days or if the only way to achieve a shelf life of at least 45 days is by storing the product refrigeration. For example, chocolate and some shortenings used in the pastry industry require a "refrigeration step" in order to form a stable fat matrix structure to provide a shelf life at room temperature of at least 45 days, whereas a cheese product would require storage at refrigerator temperatures to provide a shelf life of at least 45 days.

#### ***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 26,29,30,32-35, and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Player et al. (US 4762725).

7. Regarding claims 26, 32,33, and 35, Player et al. teach a cream comprising/consisting essentially of

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10-20% milk derivatives such as skimmed milk powder as recited in claim 26 (e.g. 10% skim milk solids in Example 1, skim milk + buttermilk solids of 10% in Example 2, Column 7, lines 15-18, Column 3, lines 23-35),

8-30% sugars (e.g. 8% in Example 2 and 10% in Example 2, Column 7, lines 51-53), 10-60% fermented dairy product ((e.g. 27% cheese powders in Examples 1 and 31% Example 2),

0.01%-25% of sour cream with 36% fat (5% of sour cream 36 in Example 2 ) which is a sufficient amount to provide desired organoleptic or smoothness as recited in claim 32,

0.01-35% texturing agent such as maltodextrin as recited in claim 33( example 2 at 7%), and

0.01-20% flavor (e.g. 1.75% jalapeno powder in Example 2), and the cream being disposed on a biscuit (i.e. crackers, sandwich creams, etc in Column 13, lines 29-38).

8. Player et al. teach salt is added, as recited in claims 26 and 35, *along with* the cheese powders (as shown in the Cheese Powder Tables 1 and 2) and further recognize that adding any particular level of salt, via dairy ingredients, may be advantageous or disadvantageous, depending on the desired flavor (column 7, lines 12-15). Player et al. are silent in teaching a particular quantity of salt, such as 0.01% to 0.5%. However, to add any particular level of salt would have been an obvious result effective variable of the type of flavor desired since adding salt was perceived as

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advantageous or disadvantageous depending on the desired flavor for the biscuit creams.

9. Regarding claim 29, Player et al. teach a molten fat from 10-45% (Example 2, Column 3, lines 22-30).

10. Regarding claim 30, Player et al. teach bulking ingredients (in Example 2 they total 25.95%) that include the aforementioned non-fat dry milk, non-fat buttermilk solids, and lactose (See Examples), all of which are milk derivatives. The claim limitation is the "milk derivative comprises" powdered skimmed milk and "the milk derivative is present in an amount of 15-20%". Clearly in example 2 of Player the bulking agents include a total of 17% of the milk derivatives (i.e. non-fat dry milk, non-fat buttermilk solids, and lactose) and comprise powdered skimmed (Column 7, line 15-18, Example 2). Thus Player et al. meets the limitation of claim 30.

11. Regarding claim 34, Player et al. teach cocoa powder (Column 9, lines 40-47).

12. Regarding claim 46, Player et al. teach two layers farinaceous substrates (column 11, lines 32-35), to select any particular farinaceous substrates would have been an obvious matter of choice depending on the desired flavor such as Viennese bread or buns.

13. Claims 27 and 44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Player et al. (US 4762725) as applied to claims 26,29,30, 32-35,38, and 46 above, further in view of Lauro (EP 0666031A2).

14. Player et al. teach a shelf stable cream based filling, which may be cocoa flavored (Column 9, lines 40-47), for bakery products (Abstract) having low moisture content (i.e. low water activity –see Examples), but is silent in teaching having living bacteria. Lauro also teaches a stable cream based-cocoa flavored filling for bakery products with a low water activity and with living bacteria. Whereas Player et al. teach fermented dairy products such as cheese powder, Lauro teaches yogurt powder with active cultures. Lauro teaches adding fermented milk powders with live active cultures, starting at  $10^7$  to  $10^{11}$  per gram of filling, as recited in claim 27, is preferred since they have a high nutritional contribution. In one example Lauro begins with a bacteria concentration of  $10^9$  per gram of filling and after four months has  $8 \times 10^5$  per gram remaining in the composition (Abstract, Page 2, lines 1-32, Page -3, lines 14-15, Example).

15. Therefore it would have been obvious to include active cultures between  $10^4$  to  $10^{11}$  per gram in the composition of Player et al. since it was recognized in the art that fermented milk products having live active cultures contribute a nutritional value to a biscuit filling and one would have been substituting one known fermented milk product for another in a biscuit filling composition. It would have been further obvious, that by doing so, one would have  $10^6$  per gram after 45 days of storage, since Lauro teaches a filling that begins with a concentration of  $10^9$  per gram results in  $8 \times 10^5$  per gram after four months (120 days). One would expect that after 45 days, or only a third of the time period taught by Lauro, at least  $10^6$  per gram would remain. Furthermore, Lauro teaches starting concentrations greater than  $10^9$  per gram (up to  $10^{11}$  per gram), and

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one would expect to have more than  $10^6$  after 45 days at greater starting concentrations.

16. Claims 26,30-34,36,39-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen (US 5800855) in view of Cajigas (US 5145697).

17. Regarding claims 26,30-34, 36, Rosen teaches an frozen cheesecake ice cream which is aerated as recited in claim 36 (Column 4, lines 48-55) may be used to make an ice cream sandwich (Abstract, Column 5, lines 1-6) comprising/consisting essentially of:

10-20% milk derivatives such as condensed skim milk (e.g. 10.3% in Example 1, column 2, lines 46-49 condensed milk comprises the equivalent composition as skimmed milk powder plus moisture) and 19.4% milk as recited in claim 30( in Column 2, lines 43-46, and whole milk is 88% moisture plus the composition found in unskimmed powdered milk),

8-30% sugars(e.g. 21.5% in Example 1, Column 5, lines 40-55),

10-60% fermented dairy product such as cream cheese as recited in claim 31 (e.g. 13% cream cheese in Example 1),

0.01%-25% of cream with 40% fat (24.5% in Example 1, column 2, lines 39-41) which is a sufficient amount to provide desired organoleptic or smoothness as recited in claim 32, and

0.01-20% flavor , such as vanilla as recited in claim 34(e.g. 0.1% in Example 1 or up to 3% in column 4, lines 39-47) ,



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18. Additionally, Rosen teaches adding a stabilizing system, which comprises texturing agents such as carob bean gum, gaur gum or carrageenan as well as salt. Rosen teaches the texturizing agents are added for viscosity and the salt increases surface tension for stability (Column 3, lines 17-25, Column 3, line 55 to Column 4, line 10 ). Rosen teaches adding the stabilizing system in a mixture (e.g. 0.5% in Example ,1), but is silent in teaching a level of texturing agent at 0.01-35% or salt at 0.01-0.5% .
19. Cajigas are relied on as further evidence that carob bean gum, gaur gum or carrageenan are texturizing agents (See Column 5, line 2 to Column 6, line 53).
20. However, to add any particular level of either texturizing agent or salt would have been an obvious result effective variable of the desired viscosity or surface tension to maintain a stable product since Rosen teaches texturizing agents are added for viscosity and the salt increases surface tension for stability .
21. Regarding claim 33, Rosen teaches texturizing agents such as carob bean gum, gaur gum or carrageenan in a frozen cultured dairy cream, but is silent in teaching maltodextrins. Cajigas is relied on as evidence of the art recognized equivalence of maltodextrins and carob bean gum, gaur gum or carrageenan in the frozen cultured dairy cream art (Column 5, line 2 Column 6, line 53). Therefore, it would have been obvious to modify Rosen and use maltodextrin since one would have been substituting one type of texturizing agent for another for the same purpose.
22. Regarding claims 39, 41,40, Rosen teaches fruit pieces including lemon rind at 0.1-3% (Column 4, lines 38-67).

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23. Claim 45 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen (US 5800855) in view of Cajigas (US 5145697) and Nelham (US 4145449).

24. Rosen teaches an frozen cheesecake ice, which may be used to make an ice cream sandwich (Abstract, Column 5, lines 1-6), having the composition recited in claim 26 for the reasons cited above in the rejection of claims 26. However, Rosen is silent in teaching a hermetically sealed plastic sachet. Nelham is relied on as evidence of the conventionality of packaging ice cream sandwiches in hermetically sealed plastic coated sachets in order to maintain the ice cream separate from the sandwich, or biscuit, and prevent the biscuit from getting soggy (Column 1, line 30 to Column 2, line 32). Therefore, it would have been obvious to package the ice cream sandwich in a hermetically sealed package since this would prevent the biscuit from getting soggy.

25. Claims 26-32,35,38,42, and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kingham et al. (US 4721622) in view of Tamime et al and Player et al. (US 4762725).

26. Regarding claims 26-32,35, Kingham et al. teaches a cream filling comprising 40% cream cheese as recited in claim 31, 20.8% double cream which would be in an amount sufficient to increase the smoothness of the mixture as recited in claim 32 since double cream is known to at least 36% fat, 3.12% of a texturizing agent (i.e. maize starch) , 0.11% of an aromatic product (i.e. spices) (See example 1). In another example, Kingham et al. teaches uses yogurt as the fermented dairy product ,which are known in the art to be between  $10^4$  to  $10^{11}$  per gram as recited in claim 27(as evident by

Tamime et al. page 393), and includes a sugar. Kingham et al. teaches the creams have a water activity of anywhere from 0.2 to 0.99, as recited in claim 28, and that they are in a biscuit, or dough based product, as recited in claim 26. Kingham et al. teach 20.8% milk, which is an ingredient *comprising or consisting essentially of* at least 18.3% unskimmed powdered milk as recited in claim 30 (i.e. whole milk is 88% moisture plus the composition found in unskimmed powdered milk and claim 30 defines a "milk derivative comprises" powdered unskimmed milk and "the milk derivative is present in an amount of 15-20%").

27. Although Kingham et al. teach the creams may be either sweet or savory (Column 4, lines 32-67), Kingham et al. are silent in teaching up 0.01 to 0.5% salt as recited in claims 26 and 35 and 8 to 30% sugar as recited in claim 26.

28. However, sugar and salt are conventional ingredients in the biscuit filling art. Kingham et al. these are well known additives in the biscuit cream filling art. For example Player et al. is relied on as evidence of the conventionality of providing 8-30% sugar in a fermented milk containing biscuit filling (e.g. 21.5% in Example 1, Column 5, lines 40-55), as well as salt (as shown in the Cheese Powder Tables 1 and 2). Player et al. further teach that adding any particular level of salt may be advantageous or disadvantageous, depending on the desired flavor (column 7, lines 12-15).

29. Therefore, it would have been obvious to add 8-30% sugar to the filling of Kingham et al. since Kingham et al. teaches sweet biscuit fillings this is a conventional level of sugar used in sweet biscuit fillings containing a fermented dairy product. Furthermore, to add any particular level of salt would have been an obvious result

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effective variable of the type of flavor desired since adding salt was perceived as advantageous or disadvantageous depending on the desired flavor for the biscuit creams.

30. Regarding claim 38, Kingham et al. teach the composition recited in claim 38 (see the rejection of claims 26-32,35 above), and further teaches the composition must be refrigerated in the process of preparing the composition (Column 9, lines 50-60), which results in a shelf stability of up to 6 months (Column 1, line 41 to Column 2, line 18).

31. Regarding claim 42, Kingham et al. teach the creams have a water activity of anywhere from 0.2 to 0.99 (Column 2, lines 20-44).

32. Regarding claim 46, Kingham et al. teach a bread-like casing, made from a yeast raised or other bread dough (Column 4, lines 31-45). Therefore, to select any particular bread product, such as buns, would have been an obvious matter of choice since Kingham et al. teach the casing is essentially bread like and formed by bread dough, and buns meet this criteria.

33. Claim 43 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kingham et al. (US 4721622) in view of Tamime et al and Player et al. (US 4762725) as applied to claims 26-32,35,38,42, and 46 above, further in view of Saintain (US 5573793).

34. Kingham et al. are silent in teaching aerating the filling. However, Saintain who also teaches a filling made with a fermented dairy product, is relied on as evidence of

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the conventionality of aerating a fermented dairy filling at a percentage overrun of 30% to higher than 200% to enhance freshness and melting characteristics (Abstract, Column 3, lines 10-13). Therefore, it would have been obvious to aerate the filling of Kingham et al. since this is known to enhance fermented dairy filling freshness and melting characteristics. Furthermore, to add any particular volume of inert gas to a any particular weight of cream would have been an obvious result variable of the volume of cream that is to be aerated.

### ***Response to Arguments***

35. Applicant's arguments filed December 26, 2002 have been fully considered but they are not persuasive.

36. In response to applicant's argument that that Player fails to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., the present invention is clearly aqueous and has a water activity value indicating an aqueous product) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). In fact, applicant's product recited in the claims is far from being "clearly aqueous". Applicant has disclosed that a "milk derivative" could be non-aqueous (e.g. powdered milk on Page 2, line 30), sugar is non-aqueous, a fermented dairy product could be non-aqueous (e.g. powdered cream cheese on Page 2, line 36), a texturizing agent is non-aqueous (maltodextrin), an aromatic product could be non-aqueous (e.g. almonds on

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page 3, line 8) and salt is non-aqueous. The only recited ingredient that is not disclosed in powdered form is the sour cream/dairy cream, of which may contributed as low as 0.01% of the recited composition. An amount of cream as low as 0.01% , containing anywhere from 18-80% water (See Webb et al., page 40), would not render an otherwise non-aqueous cream product as " clearly aqueous".

37. Applicant argues that Player does not teach "sour cream" by teaching 5% of a sour cream 36 *powder* in Example 2. First, applicant does not exclude a *powdered* sour cream in the disclosure. In fact the applicant's overall composition requires very little moisture. Second, the composition contains an *equivalent* aqueous sour cream composition since the other cheese powders, such as Land O'Lakes blue cheese, contribute some moisture to the composition, as shown in Table 2 . Land O'lakes blue cheese powder has 4% moisture (Table 2) , and thus contributes to 0.1% moisture to the composition of Example 2. As evidenced by Webb et al. (Fundamentals of Dairy Chemistry, 1965), cream with 36% fat would contain approximately 58% water (see Page 40). Therefore, the moisture contributed by the blue cheese powder *alone* brings the *equivalent* aqueous sour cream composition to 0.17%, since both solid and liquid components of 0.17% sour cream are present. Thus at the very least the composition of Player has 0.17% sour cream, based on the moisture level of only the blue cheese powder, and Player meets the limitation of the claims.

38. Applicant's argues Player does not teach the amount of salt required. The claims recite as low as 0.01% salt. Player teaches salt is added, *along with* the cheese powders (as shown in the Cheese Powder Tables 1 and 2) *and* further recognize that

adding any particular level of salt may be advantageous or disadvantageous, depending on the desired flavor (column 7, lines 12-15). Thus adding any particular level of salt would depend on the type of flavor desired.

39. Applicant further argues the milk derivative is not taught by Player or Rosen. Applicant discloses, "In one embodiment, the milk derivative *includes at least one of* powdered skimmed milk, powdered unskimmed milk, sweetened evaporated milk, or combinations thereof " (Page , lines 29-31), and Claim 30 as currently recited states the "milk derivative comprises" powdered skimmed milk and "the milk derivative is present in an amount of 15-20%". Thus, the "milk derivatives" do not exclude other ingredients. In the case of Player, Player teaches bulking ingredients (in Example 2 they total 25.95%) that include the non-fat dry milk, non-fat buttermilk solids, and lactose (See Examples), all of which are milk derivatives. Clearly in example 2 of Player the bulking agents include a total of 17% of the milk derivatives (i.e. non-fat dry milk, non-fat buttermilk solids, and lactose) and comprise powdered skimmed (Column 7, line 15-18, Example 2). Thus Player et al. meets the "milk derivative limitation". Additionally, Rosen teaches 10.3% condensed milk and 19.4% milk, both would "comprise" the compositional equivalence to the recited milk powders.

40. Applicant also argues that with the "consisting essentially of" language in claim 38, Player is not applicable because of the inclusion of lipids in Example 2. However, the examiner fails to find any support in applicant's disclosure for *excluding* any ingredients not recited in the claim. In fact on page 4, line 2, a specific composition is disclosed, followed by "A number of optional ingredients may be included, if desired."

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Therefore, the term "consisting essentially of", in light of the specification, was treated as "comprising".

41. Applicant arguments directed to Lauro are not persuasive. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). First, and foremost, as discussed previously, the "non-aqueous" argument is moot, since this is not recited in the claims. Second, both Lauro with Player teach shelf-stable creams with dried fermented milk powders and the substitution of one conventional fermented milk powder (a yogurt powder) for another (cheese powder) for a shelf stable cream would be a matter of taste/ flavor. Third, with respect to the argument that applicant's bacteria is at a given concentration of food composition, when one is talking about magnitudes of bacteria the relative amount of biscuit, which is not recited in the claims, is insignificant. For example, taking a "food composition" to be 14 grams of cream and 14 grams of biscuit (as disclosed by applicant in Example 2) with Lauro's beginning concentration of  $10^9$  per gram/cream and  $8 \times 10^5$  per gram/cream after four months (120 days), the concentration of bacteria would begin at  $5 \times 10^8$  and be at  $4 \times 10^5$  after 120 days. Fourth, with respect to having at least  $10^6$ , it is notoriously well known that refrigeration



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extends the life of the bacteria (heat is used to kill) and the claim recites two-thirds less storage time than Lauro. Therefore, one would have expected  $10^6$  with the composition of Lauro, had with refrigeration and at only 45 days of storage.

42. Applicant argues that Rosen does not teach the recited amount of salt or texturizing agent and that Rosen is a frozen product, and that applicant's is not.

Furthermore, as stated in the office action:

Rosen teaches adding a stabilizing system, which comprises texturing agents such as carob bean gum, gaur gum or carrageenan as well as salt. Rosen teaches the texturizing agents are added for viscosity and the salt increases surface tension for stability (Column 3, lines 17-25, Column 3, line 55 to Column 4, line 10 ). Rosen teaches adding the stabilizing system in a mixture (e.g. 0.5% in Example .1)...

Thus Rosen teaches the total salt plus texturizing agent is 0.5%, and thus the exact amounts would be achievable by routine experimentation. Additionally there is no temperature limitation in claim 26.

43. With respect to Kingham, applicant argues that the examiner's conclusion of obviousness is based upon improper hindsight reasoning. It must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Furthermore, it is agreed that Kingham does not teach a milk derivative explicitly, but Kingham does teach one implicitly. As stated in applicant's disclosure "the milk derivative *includes at least one of* powdered skimmed milk, powdered unskimmed

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milk, sweetened evaporated milk, or combinations thereof " (Page , lines 29-31). Milk comprises the compositional *equivalent* to powdered unskimmed milk, and thus meets the limitation. It is notoriously well known in the art that the milk (non-dehydrated) and water added to powdered milk (at an amount of moisture equivalent to non-dehydrated milk) are recognized equivalents, especially with respect to FDA labeling. Applicant further argues Kingham does not teach disposing the cream on "a layer". Clearly in Figures 5a-5c, Kingham teaches there is indeed a bottom layer and a top layer, wherein the cream is disposed on top of the bottom layer.

### ***Conclusion***

44. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

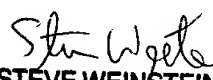
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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703)872-9310 for regular communications and (703)872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.

Robert Madsen   
Examiner  
Art Unit 1761  
March 21, 2003

  
**STEVE WEINSTEIN**  
**PRIMARY EXAMINER 1761**  
for  
M. Cano